USTELECOM
THE BROADBAND ASSOCIATION

March 22, 2018

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

RE: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

Dear Ms. Dortch:

The Federal Communications Commission (Commission) should move forward with its proposal to create a presumption that incumbent local exchange carriers (ILECs) are entitled to competitively neutral rates when attaching to investor-owned utility (IOU) poles. USTelecom – The Broadband Association (USTelecom) agrees with multiple parties in this proceeding that establishing such a presumption will streamline broadband infrastructure deployment and thereby increase broadband availability and competition in the provision of high-speed services.[1]

Indeed, broadband deployment has been – and remains – a federal policy priority for Congress, the Commission, the Executive Branch and industry. Favorable action by the Commission in the current proceeding is a means to achieve increased deployment of high speed broadband communications networks to all Americans. The Commission should seek additional market-oriented reforms that further this federal policy goal.[2]

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[1] Notice of Proposed Rulemaking, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (released April 21, 2017) (*Notice*).

[2] *See e.g.*, Second Further Notice of Proposed Rulemaking, Second Order on Reconsideration, *Lifeline and Link Up Reform and Modernization*, FCC 15-71, 30 FCC Rcd 7818, 80 FR 40923, ¶ 4 (2015) (stating that "broadband is essential to participate in society," and that "[d]isconnected consumers . . . are at an increasing disadvantage as institutions and schools, and even government agencies, require Internet access for full participation in key facets of society." *See also*, 2016 Broadband Progress Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 31 FCC Rcd 699, FCC 16-6, ¶ 2 (released January 29, 2016) (stating that "Americans continue to turn to advanced telecommunications capability for every facet of daily life, and use fixed and mobile services for distinct but equally important purposes.").

As the Commission moves forward in this proceeding, it should keep in mind that there are thousands of existing pole attachment agreements. As a result, any framework implemented by the Commission should establish a streamlined process to address unreasonable pole attachment rates contained in those existing agreements. The Commission should also provide certainty to both ILECs and IOUs about the formula the Commission will apply to determine whether a pole attachment rate is unreasonable if the parties are unable to resolve a rate dispute and must file a complaint at the Commission. Such certainty will minimize the "repeated disputes between incumbent LECs and utilities over appropriate pole attachment rates"[3] that followed the Commission's guidance in the 2011 Pole Attachment Order.

As widely acknowledged in this proceeding, uncertainties in the current pole attachment framework have created an extremely challenging environment for ILEC attachers to negotiate with IOU pole owners. Despite the Commission's intention to level the playing field for the pole attachment rates ILECs pay vis-à-vis cable operators and other competitors, this has not occurred through the negotiations contemplated in its 2011 Pole Attachment Order.[4]

The continuing negotiation imbalance between ILEC attachers and IOU pole owners also has been well documented in this proceeding. For example, some ILECs have noted that "even in the best of circumstances, negotiations for rate reductions contemplated by the 2011 order" have taken two years on average to complete, and "most have required executive level escalation and preparation, if not filing, of a pole attachment complaint."[5] Absent fair negotiations, ILECs' sole recourse is adjudication through the Commission's complaint process, which is a time-consuming, costly and highly adversarial procedure that delays an ILEC's receipt of reasonable pole attachment rates indefinitely and injects uncertainty into the cost analysis for broadband deployment.

Moreover, given the disparity in pole ownership between ILECs and IOUs, ILECs often face a "Hobson's choice" in their negotiations with IOUs: "live with insupportably high attachment rates that distort competition, or risk major disruption of their networks to obtain

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[3] *Notice*, ¶ 44.

[4] Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, 76 FR 40817, FCC 11-50, ¶ 215 (released April 7, 2011) (*2011 Pole Attachment Order*) (stating that "where parties are in a position to achieve just and reasonable rates, terms and conditions through negotiation, we believe it generally is appropriate to defer to such negotiations.").

[5] *See*, Comments of CenturyLink, WC Docket No. 17-84, p. 22 (submitted June 15, 2017).

even the chance of a reasonable renegotiation."[6] As USTelecom has demonstrated in this proceeding, the imbalance in pole ownership and the resulting lack of ILEC bargaining power that was integral to the Commission's decision to institute rate reforms in 2011 continues to this day.[7]

Data from USTelecom's 2017 survey shows that in the 46 states surveyed, for every ILEC pole to which IOUs attach, ILECs attach to three IOU poles.[8] In Commission regulated states, that pole ratio is 3.2:1, with ILECs attaching to approximately 9.7 million IOU poles, and IOUs attaching to approximately 3.1 million ILEC poles. In its 2011 Pole Attachment Order, the Commission found that such disparities would result in ILECs ultimately having "less bargaining power than the electric utility."[9] More recently, a nearly two-to-one IOU pole ownership advantage was found to be evidence of an ILEC's inferior bargaining position.[10] The results of the 2017 USTelecom Survey demonstrate that the pole ownership imbalance between ILECs and IOUs remains significant and generally is much higher than 2 to 1. Contrary to assertions by IOUs in this proceeding that the decrease in ILEC pole ownership has been intentional, this pole ownership disparity is primarily the result of marketplace realities whereby IOUs have intentionally and inexorably increased their pole ownership.[11]

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[6] *Id*.

[7] Letter from Kevin G. Rupy, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84, pp. 6 – 11 (November 21, 2017) (*USTelecom Survey*).

[8] ILECs attach to approximately 13.9 million IOU poles, whereas IOUs attach to only 4.6 million ILEC poles. *USTelecom Survey*, p., 7.

[9] *2011 Pole Attachment Order*, fn. 618.

[10] Verizon Virginia, LLC et al v. Virginia Electric and Power Company d/b/a Dominion Virginia Power, File No. EB-15-MD-006, ¶ 13 (released May 1, 2017) ("Recognizing the Commission's concern that an incumbent LEC's minority pole ownership status may negatively impact the incumbent LEC's bargaining position, we find that Dominion's nearly two-to-one pole ownership advantage, along with the significant disparity in the per-pole rates charged to each party, constitutes probative evidence of Verizon's inferior bargaining position relative to Dominion.").

[11] As noted by various commenters in this proceeding, the increase in IOU pole ownership has been driven by a number of factors that are not in the ILECs' control, including greenfield deployment of IOU networks, national disaster recovery efforts, and IOU pole replacement activities. *See e.g.*, Reply Comments of CenturyLink, WC Docket No. 17-84, pp. 3 – 4 (submitted July 17, 2017) (noting that when new neighborhoods are built, IOUs are the first to move into those areas. In addition to installing the new utility poles which they immediately claim as their own, they are unwilling to sell them. In other instances, IOUs will sometimes replace ILEC poles – often times without providing notice to the ILEC – in order to accommodate new power

USTelecom therefore supports the Commission's proposal that "the 'just and reasonable rate' under Section 224(b) for incumbent LEC attachers should presumptively be the same rate paid by other telecommunications attachers, *i.e.*, a rate calculated using the most recent telecommunications rate formula."[12] A simple and competitively neutral way for the Commission to implement its proposal would be to include ILECs' pole attachments in 47 C.F.R. §1.1409(e)(2), so the same maximum just and reasonable rate formula would apply to ILECs and their competitors providing telecommunications services. Also consistent with the manner in which the Commission originally implemented the telecommunications formula, the Commission should clearly state that any rate reductions resulting from its revised regulations are to be implemented immediately.[13]

To avoid ongoing disputes that waste resources on litigation costs and delay the implementation of just and reasonable rates for ILECs, USTelecom requests that the Commission make clear that it will apply the most recent telecommunications formula to calculate the maximum just and reasonable rate per pole when an ILEC and IOU fail to resolve a dispute regarding charges for pole attachments.[14] This rate should apply regardless of whether the pole attachments were made under an agreement that was entered into before or after the Commission's decision. Providing certainty as to the formula the Commission will apply, and the manner in which it will be applied, will incentivize the parties to resolve disputes through negotiation and obviate the need for litigation.[15]

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attachments or during storm restoration). *See also*, Comments of Verizon, WC Docket No. 17-84, p. 11 (submitted June 15, 2017).

[12] *Notice*, ¶ 45**.**

[13] *See* 47 C.F.R. §1.1409(f) ("Any increase in the rates for pole attachments that results from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately.").

[14] As proposed by the Commission, the IOU should only be permitted to charge an ILEC a rate higher than the new telecom rate if the IOU can demonstrate "with clear and convincing evidence that the benefits to the incumbent LEC far outstrip the benefits accorded to other pole attachers" by showing that the ILEC owns a majority of the joint use poles. *See*, *Notice*, ¶ 45. Even where the IOU has met this burden, the Commission should make clear that the IOU bears the burden of proving that the increased rate is warranted based on the value of the additional ILEC benefits and that in no event will the rate be higher than the pre-2011 telecommunications rate.

[15] *See*, *2001 Order on Reconsideration*, ¶ 11 (The Commission "concluded that the current complaint procedures are adequate to establish just and reasonable rates, terms, and conditions for pole attachments, and determined that the existing methodology for determining a presumptive maximum pole attachment rate for telecommunications carriers, as

Such an approach is consistent with the Commission's long-standing "sign-and-sue" rule, which allows an attacher to challenge the lawfulness of terms in an executed pole attachment agreement.[16] Moreover, as the extensive litigation following the 2011 Pole Attachment Order proved, ILECs "genuinely lack[] the ability to terminate an existing agreement and obtain a new arrangement."[17] Any ambiguity in the application of the just and reasonable ILEC rate will provide IOUs with an ongoing incentive to refuse to provide competitively neutral rates until the Commission orders the IOU to do so under each individual existing agreement.

USTelecom greatly appreciates and supports the Commission's continuing efforts to establish regulatory parity among broadband competitors. We urge the Commission to expeditiously adopt its proposal for a presumptive just and reasonable rate formula for ILEC attachers.

Please contact the undersigned with any questions.

Sincerely yours,

Kevin G. Rupy
Vice President, Law & Policy

modified, facilitates negotiation because the parties can identify an anticipated range for the pole attachment rate.").

[16] *2011 Pole Attachment Order*, ¶ 119.

[17] *See id*., at ¶ 216; *see also* Verizon Florida LLC v. Florida Power and Light Company, File No. EB-14-MD-003, ¶ 25 (released February 11, 2015) (finding "this appears to be a case in which 'an incumbent LEC . . . genuinely lacks the ability to terminate an existing agreement'" where "dismissal with prejudice could force Verizon to pay the relatively high Agreement Rates for as long as its attachments remain on Florida Power's poles").